IN THE COURT OF APPEALS OF IOWA

No. 0-365 / 09-1821
Filed June 16, 2010

IN RE THE MARRIAGE OF ANGELA LEA MENNEN AND VANCE DALE MENNEN

Upon the Petition of

ANGELA LEA MENNEN n/k/a
ANGELA LEA PRUNTY,
Petitioner-Appellee,

And Concerning

VANCE DALE MENNEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Respondent appeals from the district court's refusal to find petitioner, the mother of the parties' fourteen-year-old son, in contempt for violating the visitation provisions of the parties' dissolution decree. **REVERSED AND REMANDED.**

Craig Ament of Ament Law Firm, Waterloo, for appellant.

James F. Kalkhoff of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

SACKETT, C.J.

Vance Dale Mennen appeals[1] from the district court's refusal to find the mother, Angela Prunty, of his fourteen year old son in contempt for violating the visitation provisions of the parties' dissolution decree. We reverse and remand.

SCOPE OF REVIEW. Our review is at law and not de novo. *Sullma v. Iowa Dist. Ct.*, 574 N.W.2d 320, 321 (Iowa 1998). However, this is a review from the district court's refusal to hold a party in contempt under Iowa Code section 598.23 (2009).[2] This statute allows the district court some discretion and alternate punishments for contempt. The district court may consider all the circumstances, not just whether a willful violation of a court order has been shown, in deciding whether to impose punishment for contempt in a particular case. *In re Marriage of Swan*, 526 N.W.2d 320, 327 (Iowa 1995). Consequently, the district court here had broad discretion and unless this discretion is grossly abused, the district court's decision must stand. *Id.*; *see also State v. Lipcamon*, 483 N.W.2d 605, 607 (Iowa 1992).

---

[1] A direct appeal is permitted when an application for contempt is dismissed. *State v. Lipcamon*, 483 N.W.2d 605, 606 (Iowa 1992).

[2] Iowa Code section 598.23 provides in relevant part:

> (1) If a person against whom a . . . final decree has been entered willfully disobeys the order or decree, the person may be cited and punished by the court for contempt . . . .
>
> (2) The court may, as an alternative to punishment for contempt, make an order which
>
> . . .
>
> (b) Modifies visitation to compensate for lost visitation time or establishes joint custody for the child or transfers custody.
>
> (c) Directs the parties to provide contact with the child through a neutral party or neutral site or center.
>
> (d) Imposes sanctions or specific requirements or orders the parties to participate in mediation to enforce the joint custody provisions of the decree.

BACKGROUND. The child in question was born in 1995 and the parties' marriage was dissolved the following year. Their relationship following the dissolution has had problems but it appears that until the spring of 2009 the child exercised visitation with his father on a regular basis. Unfortunately, just before the child's fourteenth birthday on April 19 of that year, there was a dispute as to what time of day on the child's birthday, a Sunday, Vance would return the child to Angela. Vance was to have the child for the weekend of April 14 to 19, but it was Angela's year to have the child for his birthday and birthdays took precedence over weekend visitation. There were some unkind words exchanged between the parties and Angela elected to share part of the conversation with their son who subsequently relayed to his father by text message that he did not want to go with him for his regular weekend visitation.

Vance, who regularly went to school to pick up the child on Thursdays for his visitation, did so on April 16 only to learn that Angela had already picked the child up. Angela and the child then met with a police officer. The officer testified that the child was crying and told her he was scared of his father. He stated to the officer that his father lives in the country, takes his cell phone away, and has a rifle and a grenade launcher. The child told the officer his father has never physically abused him but is mentally and emotionally abusive towards him. The child did not have his weekend visit with his father. However, Vance did have visitation with the child on April 22 and 23 and again on April 30 through May 3 without incident. On May 6 Vance again went to school to pick up his son only to find that Angela had picked him up earlier and a similar situation occurred on

June 15. It appears both parties acknowledge these were Vance's scheduled visitation periods.

Vance filed this application to have Angela found in contempt on June 25, 2009, contending that since April of that year Angela was in contempt of the current order establishing Vance's visitation with his son. A hearing on the matter was held on September 15 and 18, 2009. On October 9, 2009, the district court filed its ruling. The district court recognized, as do we, that the court order has not been followed. However, the court found the order was not willfully disobeyed and found that the child began his withdrawal from his father in March or April of 2009 due to the child's feelings that he was isolated in his father's home during his visits, because his father confiscated his cell phone, and for being talked "down to." The court noted the perceptions of the child, whether they were correct or not, were his perceptions. The court also found Vance can be very emotional and when he tries to communicate verbally often his emotions "get the best of him." The court noted it considered reports from the Cedar Falls Police Department and the Cedar Falls school system, and a letter from therapist Pamela Correll as bearing out its observations. The court then said:

> As a result, the Court finds that the petitioner [Angela] has not interfered with the visitation or manipulated [the child] into withdrawing from visitation . . . and respondent's [Vance's] application for rule to show cause is denied. The Court finds, however that [the child] should continue with his counseling with Ms. Pam Correll and that the respondent [Vance] should continue with his counseling with Ms. Janet Riley. Upon recommendation from both counselors, family counseling shall start so that this relationship can be repaired.

CONTEMPT. Contempt is defined as willful disobedience. *McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 824 (Iowa 1996). A party alleging contempt has the burden to prove the contemner had a duty to obey a court order and willfully failed to perform that duty. *Ary v. Iowa Dist. Ct.*, 735 N.W.2d 621, 624 (Iowa 2007). If the party alleging contempt can show a violation of a court order, the burden shifts to the alleged contemner to produce evidence suggesting the violation was not willful. *Id*. However, the person alleging contempt retains the burden of proof to establish willfulness beyond a reasonable doubt because of the quasi-criminal nature of the proceeding. *Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 745 (Iowa 1993). A finding of disobedience pursued "willfully" requires evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemer had the right or not. *Ary*, 735 N.W.2d at 624. Angela disobeyed the court order establishing Vance's visitation when she picked the child up at school so he was not available to Vance. The question therefore is whether her actions can be shown to be willful.

REPORT OF COUNSELOR. Vance first contends the district court erred in admitting over his objection a letter to "Whom it May Concern" from Pam Correll, a licensed social worker. Correll had met, apparently for counseling, with the child and his mother. The letter reported things Correll was told by others as well as her opinions on the visitation issue.

Vance contends the letter was hearsay and should not have been admitted or considered by the district court. In seeking to admit the letter identified as exhibit two, Angela's attorney asked Angela to identify the document. Angela identified it as a report from Pam Correll that was signed by Correll and Angela further noted that Correll is the same counselor who sees her son.

Vance's attorney made the following objection to the letter being received in evidence;

> It is a hearsay statement by Pam Correll and essentially places her outside of my ability to cross-examine her. It is not a medical record. It is apparently a letter authored for her counsel. I believe it is improper.

The district court made the following cursory ruling:

> Equitable proceeding. Best interests of the child. Objection received. Two is received.

We agree with Lance that the letter should not have been received in evidence. This contempt matter was tried under chapter 598 which has no provision relaxing the hearsay rules of evidence in a contempt proceeding. *See In Marriage of Williams*, 303 N.W.2d 160, 163 (Iowa 1981). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *State v. Miller*, 204 N.W.2d 834, 840 (Iowa 1973). Correll did not testify, consequently Lance was not afforded an opportunity to cross-examine her concerning the statements in the letter and her observations and conclusions. *See Williams*, 303 N.W.2d at 163. The report also contained hearsay on hearsay in that Correll

quoted statements made to her by others. *See id*.; *see also In re Marriage of Reschly*, 334 N.W.2d 720, 723 (Iowa 1983). It was an abuse of discretion for the district court to admit the Correll letter and to consider the Correll letter in arriving at its decision. We reverse and remand to the district court to address, without considering the Correll letter, whether the actions of Angela in disobeying the visitation order were willful.

REVERSED AND REMANDED.